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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY STEPHON MAYERS,

Defendant and Appellant.

C060140

(Super.Ct.No.
06F06419)

A jury found defendant Anthony Stephon Mayers guilty of eight crimes arising from a string of home burglaries, including three counts of first degree residential burglary; rape; sexual penetration by a foreign object; two counts of receipt of stolen property; and one count of vehicle theft. The jury also found that, during the commission of the sex offenses, defendant used a deadly weapon within the meaning of Penal Code section 12022.3 subdivision (a) (further section references are to the Penal Code unless otherwise specified) and personally used a deadly or

dangerous weapon, a knife, within the meaning of section 667.61, subdivision (e)(4).

On appeal, defendant contends the trial court committed prejudicial error when the court (1) instructed the jury that it could find a weapon use allegation true based upon a finding that defendant used a *dangerous* weapon, without finding that he used a *deadly* weapon, (2) prohibited the jury from asking questions regarding the beyond-a-reasonable-doubt instruction, (3) imposed a consecutive sentence for the sexual penetration conviction pursuant to section 667.6, subdivision (c), and (4) miscalculated the amount of presentence conduct credit to which defendant was entitled.

We agree, and the People concede, the trial court miscalculated defendant's conduct credits. Finding no other prejudicial error, we shall modify the judgment as to conduct credits and affirm it as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Anna N. Burglary and Sexual Assault

On July 5, 2006, defendant entered the apartment of Anna N. and her partner. Anna, who was alone in the apartment sleeping, awoke to find defendant standing over her. Defendant said he had a knife¹ and told Anna she needed to do what he said. He held the knife up to her and demanded money or sex. When Anna said she had no money,

¹ In a 9-1-1 call after defendant left, Anna told the dispatcher that defendant pulled out a knife that, in Anna's words, "might even have been [a] butter knife, like, I don't even know, like, oh." At trial, Anna testified that she thought the knife looked "like a butter knife almost. I don't know."

he threw back the sheet, grabbed her by the knees and pulled her towards him, opening her legs and rubbing his hand on her vagina. Defendant pulled his pants down and climbed on top of Anna. Anna begged defendant not to do it and asked him whether he had any protection. Defendant asked why she needed protection. Anna lied and told him that she had herpes and had an open lesion. Defendant felt around with his hand, penetrating her vagina with his fingers to see if he could feel something. Anna told him that she was a lesbian and had never had sex with a man before. Defendant paused, then said something like, "you only live once," and began trying to penetrate her with his penis, causing her pain. Eventually, after penetrating her only about "two inches," defendant got up and said, "Well, you didn't give me any sex, you cannot give me any money, so what are you going to do?" Anna offered defendant a jar filled with change and told him he could have anything in the apartment. Defendant scoffed at her and told her to turn around, which she did, fearful that defendant was going to kill her. He held the knife to her back for a moment, said he was not going to kill her, and left.

When police arrived, they discovered a number of items missing from Anna's apartment, including a can of pepper spray. Several weeks later, police searched defendant's apartment and found, among other things, a butter knife on the bed and a canister of pepper spray on top of the dresser.

Mongeau/Penney Burglary

On July 8, 2006, defendant entered the apartment of Mary Penney and Kathryn Mongeau as they slept. He stole some bottles of wine and several other items, including Mongeau's purse and digital camera,

and Penney's cell phone and iPod. Penney awoke to find the sliding screen door ajar. When she got up to close it, she encountered defendant coming out of the kitchen holding several bottles of wine. Defendant ran past her, dropping one of the bottles of wine as he fled. The stolen wine bottles were later found in defendant's apartment. Penney identified defendant in a photographic lineup and again at trial.

Matthew Quinton Burglary

On July 22, 2006, Matthew Quinton awoke to find that numerous personal items had been stolen from his apartment while he and his girlfriend slept on the living room floor and also found that his girlfriend's automobile had been taken. Items stolen from Quinton and his girlfriend were later found in defendant's apartment.

Brenda Crosier Burglary

On July 22, 2006, Brenda Crosier awoke to find someone had entered her family's apartment and stolen various items while she and her children slept. Items stolen from Crosier were later found in defendant's apartment.

Defendant's arrest, trial, and sentencing

Defendant was arrested and charged by amended information with three counts of first degree residential burglary with intent to commit larceny and any felony (§ 459--counts one, four and five), sexual penetration with a foreign object (§ 289, subd. (a)(1)--count two), rape (§ 261, subd. (a)(2)--count three), vehicle theft (Veh. Code, § 10851, subd. (a)--count six), and two counts of receiving stolen property (§ 496, subd. (a)--counts seven and eight). The information further alleged that, with respect to counts two

and three, defendant used a deadly weapon within the meaning of section 12022.3, subdivision (a), committed the offenses during the commission of a burglary within the meaning of section 667.61, subdivisions (d)(4) and (e)(2), and personally used a deadly or dangerous weapon--a knife--during the commission of the offenses within the meaning of section 667.61, subdivision (e)(4).

At the conclusion of trial, the jury found defendant guilty of all eight counts. With respect to the sexual penetration and rape convictions, the jury found the following allegations true: that defendant personally used a deadly weapon in the commission of the offense within the meaning of section 12022.3, subdivision (a); that he committed the offense during the commission of a burglary; and that he personally used a deadly or dangerous weapon, to wit, a knife, during the commission of the offense within the meaning of section 667.61, subdivision (e)(4).

Defendant was sentenced to an indeterminate term of 25 years to life plus 16 years in state prison as follows: the middle term of four years on count one, stayed pursuant to section 654; the middle term of six years on count two, plus four years for the weapon enhancement (§ 12022.3, subd. (a)); 25 years to life on count three; the middle term of four years on count four, plus four years for the weapon enhancement (§ 12022.3, subd. (a)), stayed pursuant to section 654; a consecutive term of 16 months (one-third the middle term) on count five; the middle term of two years on count six, stayed pursuant to section 654; a consecutive term of eight months for count seven; and the middle term of two years for count eight, stayed pursuant to section 654. The court imposed specified fees

and fines, and awarded defendant 795 days of actual credit and 38 days of conduct credit, for a total of 833 days of presentence custody credit.

DISCUSSION

I

Defendant contends the trial court instructed the jurors in a manner that allowed them to find the weapon use enhancement true based upon a finding that the weapon was *dangerous*, without finding that it was *deadly* as required by section 12022.3, subdivision (a), which states that a person convicted of rape or sexual penetration with a foreign object shall receive a sentence enhancement "if the person uses a firearm or a *deadly weapon* in the commission of the violation." (Italics added.)

The People concede that the court erred in including the term "dangerous" when instructing the jury on the knife use enhancement allegation based on section 12022.3. The People argue, however, that the error was harmless because the jury was properly instructed on the elements necessary to establish the deadly weapon allegation. As we will explain, defendant was not harmed by the weapon enhancement instruction.

A

The information alleged that, in committing sexual penetration and rape, defendant used a deadly weapon within the meaning of

section 12022.3, subdivision (a), and used a deadly or dangerous weapon within the meaning of section 667.61, subdivision (e) (4)².

The jury was given the following CALCRIM No. 3145 instruction on the weapon use enhancement: "a *deadly or dangerous weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury. [¶] In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose." (Original italics.)

During deliberations, the jury requested read back of portions of Anna's testimony regarding the knife, and asked several questions related to the weapon use enhancement. For instance, the jury asked, "Do we have to find that the object or weapon was 'inherently' dangerous or that it was 'capable of causing and likely to cause death or great bodily injury' for the defendant to be found guilty." After consulting with counsel, the court, replied, "Yes. In order to find the allegation that the defendant personally used a deadly or dangerous weapon during the commission of the crimes charged in Count 2 and 3 to be true, you must find either (a) that the object,

² Section 667.61, subdivision (e) (4) states that a conviction for rape or sexual penetration with a foreign object is punishable by imprisonment for 25 years to life when the defendant "personally used a *dangerous or deadly weapon* or a firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53." (Italics added.)

instrument, or weapon was inherently deadly or dangerous or (b) that it was used in such a way that it was capable of causing and likely to cause death or great bodily injury."

The jury also asked, "Can we find the defendant guilty of the crime of use of a deadly weapon solely on the notion that he had an object (regardless of what the object actually was) in his hand that he was holding in a threatening manner or that he was holding as if it was a deadly or dangerous weapon?" The court replied, "You may find the allegations in Count 2 and 3 that the defendant personally used a deadly or dangerous weapon during the commission of the crimes charged in those counts to be true only if the defendant personally used an object, instrument, or weapon that *actually was* a 'deadly or dangerous weapon' within the meaning of that term as it is defined in Instruction 3145 at page 36. You may not find the allegations to be true if you are convinced only that he held an[] object, instrument, or weapon *as if it were* a deadly or dangerous weapon." (Original italics.)

In that same vein, the jury asked another question, "Would you please provide us with the legal definition for a 'dangerous weapon' AND a legal definition for a 'deadly weapon' with reference to distinguishing between special allegations 1 and 4 for Counts 2 and 3." The court responded, "The differences in the adjectives in the verdict forms for allegations 1 and 4 in Counts 2 and 3 are inadvertent. The verdicts [sic] forms for both should refer to 'a deadly or dangerous weapon.' Please assume that the forms do so refer with respect to the findings on the first allegations."

The jury found both of the weapon use enhancements true.

"[A] 'deadly weapon' means 'either an instrument designed to cause death or great bodily injury or . . . an instrument used in such a fashion as to be capable of causing death or great bodily injury. . . .'" (*People v. Steele* (1991) 235 Cal.App.3d 788, 792.) "In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.)

As this court has said before, "[t]here are two classes of dangerous or deadly weapons: instrumentalities that are weapons in the strict sense, such as guns and blackjacks; and instrumentalities which may be used as weapons but which have nondangerous uses, such as hammers and pocket knives. [Citation.] Instrumentalities in the first category are '"dangerous or deadly"' per se. [Citation.] An instrumentality in the second category is only '"dangerous or deadly"' when it is capable of being used in a '"dangerous or deadly"' manner and the evidence shows its possessor intended to use it as such. [Citation.]" (*People v. Burton* (2006) 143 Cal.App.4th 447, 457.)

Here, the trial court properly instructed on a "deadly weapon" notwithstanding the inclusion of the reference to "dangerous weapon" in its language. The jury was instructed on how to find whether the object held by defendant was either "inherently deadly or dangerous" or was "used in such a way that it is capable of causing and likely to cause death or great bodily injury." The instruction gave further

guidance on the facts and circumstances to consider in determining "whether an object is a deadly weapon."

The jurors' questions regarding the instructions focused on whether they could find defendant used a deadly weapon based solely on a finding that, regardless of what the object was, defendant held it in a threatening manner as if were a deadly or dangerous weapon. The trial court responded in the negative, telling the jurors they could find the enhancement true under a method-of-use theory only if they found the object actually was a deadly or dangerous weapon. Thus, applying the instructions given to them, the jurors understood that, in order to find the weapon use enhancement true based on the way in which defendant held the object would require a finding that the object was "used in such a way that it is *capable of causing and likely to cause death or great bodily injury*." (Italics added.)

Assuming, but not concluding, there was insufficient evidence that the knife defendant used was "inherently deadly or dangerous," the evidence supports a finding that it was "used in such a way that it is capable of causing and likely to cause death or great bodily injury." Defendant told Anna that he had a knife, and he held it up to her, threatening her with it, and demanded that she give him money or sex. When he obtained neither, he stated, "What's going to keep me from killing you right now? . . . Give me one good reason why I should let you live." He said this as he held the knife against her back and told her to turn away from him. From the evidence, a reasonable jury could find that any knife, used in this manner, was capable or likely to cause death or great bodily injury.

Defendant argues he suffered prejudice because "it is likely that the jury concluded that the type of knife that [defendant] was holding was a *butter* knife." We do not engage in such speculation. Instead, we refer to the record, which demonstrates that defendant told Anna he had a knife and then brandished an object resembling a knife and threatened her with it. Anna told the 9-1-1 dispatcher that defendant had a knife. She said it "might even have been [a] butter knife," but she did not know. At trial, Anna testified she thought the knife looked "like a butter knife almost," but again she was not sure. From this evidence, it was plain that defendant had a knife and that he intended to use it in a dangerous or deadly manner, as a means to threaten Anna and force her to comply with his demands. The evidence does not clarify whether it was rounded or pointed, sharp or dull, smooth or serrated. While Anna testified the object defendant held to her back did not feel "pointed," there is a lack of any further detail in the description of the knife due to the dark environment and the fact Anna was under an extreme amount of stress and not wearing her eyeglasses. Nevertheless, the fact that defendant began his assault by telling Anna he had a knife, coupled with the fact he held it up to her and then, before leaving, held it to her back, is evidence from which the jury could reasonably infer that the knife was deadly because it was "used in such a way that it is capable of causing and likely to cause death or great bodily injury."

We would reach the same result even if we assume that the object was a butter knife. "'A small pocket knife, a walking cane, a switch of the size of a woman's finger, if strong and tough, may be made a

deadly weapon if the aggressor shall use such instrument with great or furious violence, and especially, if the party assailed should have comparatively less power than the assailant, or be helpless and feeble. . . . It is the use of such instrument that gives consequence to the offense.'" (*People v. Freeman* (1927) 86 Cal.App. 374, 376.) Anna, who was lying in bed without any clothes, trying to cover herself up with a pillow and a bed sheet, certainly had less power than defendant, whom she described as a "big guy, a tall, . . . well-built" person, strong enough to "grab [her] by the ankles and pull [her] down" on the bed. Defendant showed that he had the present ability to use the knife in a deadly or dangerous manner when he brandished it and climbed on top of Anna. "'Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be so established.'" (*People v. Raner* (1948) 86 Cal.App.2d 107, 112.) Thus, it was reasonable for the jury to infer that the knife defendant used was a deadly weapon within the meaning of the statute.

Defendant argues that he suffered prejudice because the jury was struggling with the dangerous versus deadly issue, as evidenced by the jurors' request for read back of Anna's testimony regarding the weapon, and the several questions posed to the court regarding the weapon use instructions. To the contrary, the fact the jury struggled with the issue demonstrates that the jury did not engage

in superficial deliberations devoid of careful thought or proper consideration of the evidentiary requirements necessary to make the findings.

Defendant argues further that, because the instructions did not differentiate between "dangerous" and "deadly," it was possible the jurors "were forced to come up with their own definition of a dangerous weapon." That error, he argues, could have resulted in the jury finding "the weapon use enhancement true without finding all the features necessary for use of a deadly weapon true." Not so. As previously discussed, the jury was properly instructed on the elements necessary to find defendant used a deadly weapon, to wit, that the knife was "used in such a way that it is capable of causing and likely to cause death or great bodily injury."

Finally, defendant says he suffered prejudice because the court prohibited the jury from asking questions regarding the beyond-a-reasonable-doubt instruction. As we shall explain in part II of this opinion, defendant's claim lacks merit.

In sum, we conclude defendant would not have obtained a more favorable result if the court had instructed as he says it should have instructed on this issue.

II

In instructing the jury, the trial court included the following, "Also, if you would like me to expand upon or explain further any of the rules covered in these instructions, with the one exception, send out a note requesting that and I'll be happy to help you in that way if I can. So if you need anymore guidance on the instructions. [¶] There is one exception. I am not allowed, prohibited by law --

I'm not allowed to comment on the instruction on proof beyond a reasonable doubt. That's out of bounds. But aside from that, I can help you on any of the other instructions. . . ."

Defendant contends the trial court's admonishment to the jury violated the mandate in section 1138 which requires that, when requested to do so, the court must provide the jury with information on any point of law arising in the case.³ He claims the omission defies harmless error analysis because its precise effects are "necessarily unquantifiable and indeterminate" given the suppressive effect the admonition had on the jury, and because the directive may have had a chilling effect on the deliberative process regarding reasonable doubts or other matters. Defendant argues further that, even assuming an analysis could be conducted, the error was not harmless because the court "refused to provide guidance, or take questions, or even reiterate instruction" on a key issue, possibly minimizing the significance of the concept of proof beyond a reasonable doubt, or causing the jury to "surrender[] their independent judgment or understanding" regarding the standard of proof, or even silence concerns the jury might have had regarding that standard.

³ Section 1138 states: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

The People argue the claim addresses a "noninstructional statement[] or comment[] by the trial court" and is therefore not cognizable on appeal due to defendant's failure to object at trial. (*People v. Anderson* (1990) 52 Cal.3d 453, 468.) We agree that the statement at issue was noninstructional and that defendant's failure to object at trial precludes him from raising the issue on appeal; this is so because a timely objection and a proper admonition could have corrected any possible error. (*People v. Terry* (1970) 2 Cal.3d 362, 398, overruled on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312, 381.)

In any event, defendant's claim of error fails on the merits. The reasonable doubt instruction was read to the jurors prior to deliberation. The written instruction was provided to them for use during deliberation. Defendant's counsel spoke about the meaning of the concept of beyond a reasonable doubt in closing argument, applying that concept to each of the counts in dispute. The jury was adequately instructed on the beyond-a-reasonable-doubt standard.

III

Defendant contends the trial court abused its discretion when it stated, as the sole reason for imposition of a full, separate, and consecutive sentence for the sexual penetration conviction, that "[c]onsecutive sentencing is indicated because of the manner in which the crimes were carried out, which indicates planning." Defendant asserts that, to constitute planning, the conduct must be such that, when compared to other ways in which a crime could be committed, would make the crime committed by defendant distinctively worse than the ordinary. (Citing *People v. Charron* (1987) 193

Cal.App.3d 981, 994-995.) Accordingly, he argues, "the digital penetration crime was either completely unplanned, or if planned at all, certainly not to a level which made the crime worse than the ordinary such crime."

The People agree there is insufficient evidence to support the finding that the offense involved planning, but contend the error is harmless because there is no reasonable probability that the sentence would be reduced on remand.

Section 667.6 provides that a trial court may impose a full consecutive term for a conviction of rape or sexual penetration "if the crimes involve the same victim on the same occasion." (§ 667.6, subds. (c) & (e).) ""It is well settled that in making sentencing choices pursuant to section 667.6, subdivision (c), sexual assault offenses, the trial court must state a reason for imposing a consecutive sentence and a separate reason for imposing a full consecutive sentence as opposed to one-third the middle term as provided in section 1170.1." [Citation.] . . . [H]owever, the court may "repeat the same reasons." (Cal. Rules of Court, rule 426(b) [, now rule 4.426(b)].)' [Citation.] 'What is required is an identification of the criteria which justify use of the drastically harsher provisions of section 667.6, subdivision (c). The crucial factor, in our view, is that the record reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c).'

[Citation.] In making this determination, '[t]he sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 [(aggravating

circumstances)] and 4.423[(mitigating circumstances)], as well as any other reasonably related criteria as provided in rule 4.408 [(enumerated criteria not exclusive)].' (Cal. Rules of Court, rule 4.426(b).)" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 411.)

The record makes plain that the trial court recognized its discretion in imposing a harsher sentence under section 667.6, subdivision (c). The People concede that the reason given (the manner in which the crimes were carried out indicates planning) is not supported by the evidence. Even if we were to accept the concession, we would find that defendant did not suffer any prejudice.

Defendant was bigger, taller, and stronger than Anna, who was naked and asleep in bed when he initiated his assault. Defendant seemed to toy with her, pondering whether or not he should kill her after she would not give him money or sex. The court noted that Anna was a "petite woman in many ways childlike, vulnerable, and fragile," and that the crimes committed against her "were cruel and sadistic." The facts support a finding that Anna was particularly vulnerable, as well as a finding that the crimes defendant committed against her showed a high degree of cruelty, viciousness or callousness, both circumstances in aggravation under California Rules of Court, rule 4.421(a)(1) and (a)(3). Therefore, it is not reasonably probable that defendant would receive a lesser sentence on remand. Where

"[t]he record justifies section 667.6, subdivision (c) consecutive sentences and supports the trial court's discretion in imposing those sentences," there is no cause for remand. (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1318.)

IV

Defendant contends, and the People concede, the trial court undercalculated the amount of presentence conduct credits. We agree and will modify the abstract of judgment to reflect that defendant is entitled to 119 days of conduct credit, for a total of 914 days of presentence credit. (*People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be corrected at any time].)

We deem defendant to have raised the claim that amendments to section 4019 are retroactive and entitle him to additional credits. (Misc. order No. 2010-002, filed March 16, 2010.) However, the amendments do not apply to defendant because he was convicted of a serious felony. (Pen. Code, § 1192.7, subds. (c)(3), (18) & (23); Pen. Code, § 4019, former subds. (b)(2) & (c)(2) [as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50]; Pen. Code, § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, eff. Sept. 28, 2010].)

DISPOSITION

The judgment is modified to reflect that defendant is entitled to presentence custody and conduct credits for 795 days of actual custody and 119 days of conduct credit, for a total of 914 days of custody credit. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the

modification and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SCOTLAND, Acting P. J.*

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.